

Decision **DRAFT DECISION OF ALJ PATRICK** (Mailed July 20, 2004)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Valencia Water Company (U34-W) seeking approval of its updated Water Management Program as ordered in Commission Resolution W-4154 dated August 5, 1999.

Application 99-12-025  
(Filed December 17, 1999)

**OPINION ON SECOND REQUEST  
FOR INTERVENOR COMPENSATION**

This decision awards the Angeles Chapter of the Sierra Club (Sierra Club) \$4,074.18 for its contribution to Decision (D.) 01-11-048, the principal decision in this case granting Valencia Water Company (Valencia) permission to expand its service area and D.03-10-063, which led to the stay of D.01-11-048 in part.

**I. Procedural Summary**

On February 23, 2004, Sierra Club filed its second request for compensation in this proceeding. Valencia filed its opposition to Sierra Club's request on March 23, 2004. Sierra Club filed its reply on April 7, 2004. Thereafter, on April 28, 2004, Sierra Club filed a document captioned Supplemental Authority in Support of Sierra Club's Request for Compensation. Valencia replied on May 12, 2004, and this matter was submitted for decision.

**II. Background**

In D.01-11-048, the Commission authorized Valencia to expand its service area. Following several unsuccessful appeals by Sierra Club, the Commission issued D.03-10-063, staying D.01-11-048 in part, until the West Creek

Environmental Impact Report (EIR), one of the EIRs on which Valencia's applications were based, was recertified by the lead agency, the County of Los Angeles.

In D.03-01-058, dated January 30, 2003, the Commission awarded Sierra Club \$46,990.96 for its contribution to D.01-11-048. This second request for compensation now before us largely covers Sierra Club's two petitions to the California Supreme Court seeking judicial review of D.01-11-048, both of which the Court denied.

### **III. Requirements for Awards of Compensation**

The intervenor compensation program, enacted by the Legislature in Pub. Util. Code §§ 1801-1812, requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if the intervenor makes a substantial contribution to the Commission's proceedings. The statute provides that the utility may adjust its rates to collect the amount awarded from its ratepayers.

All of the following requirements must be satisfied for an intervenor to obtain a compensation award:

1. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)
2. The intervenor must satisfy certain procedural requirements including the filing of a sufficient notice of intent (NOI) to claim compensation within 30 days of the prehearing conference (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)

3. The intervenor must file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
4. The intervenor must demonstrate “significant financial hardship.” (§§ 1802(g), 1804(b)(1).)
5. The intervenor’s presentation must have made a “substantial contribution” to the proceeding, through the adoption, in whole or in part, of the intervenor’s contention or recommendations by a Commission order or decision. (§§ 1802(i), 1803(a).)
6. The claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806.)

#### **IV. Timeliness**

Section 1804(c) provides that:

“(c) Following issuance of a final order or decision by the commission in the hearing or proceeding, a customer who has been found, pursuant to subdivision (b), to be eligible for an award of compensation may file within 60 days a request for an award. . . .”

On December 22, 2003, the California Supreme Court mailed its Order Denying Sierra Club’s Second Petition for Review. Sierra Club filed its second request for compensation on February 23, 2004, which is the 63<sup>rd</sup> day after the Court’s denial. Although the statute refers to a final Commission order, it is reasonable to treat D.03-10-063 as becoming “final” for purposes of the statute on the date when Sierra Club exhausted its avenues for judicial review. Thus, we will consider Sierra Club’s compensation request timely filed.

Sierra Club has satisfied requirements 1, 2, and 4, as described in D.03-01-058, where we dealt with Sierra Club's first request for compensation. The remaining requirements are discussed below.

## **V. Substantial Contribution**

The issue before us is whether Sierra Club is entitled to compensation for its unsuccessful appeals to the California Supreme Court. The short answer is that a substantial contribution to a Commission order or decision does not always entitle the party to compensation for its costs of obtaining judicial review of that decision. In this instance, we deny Sierra Club's claim for the reasons discussed below.

Sierra Club argues that it is entitled to compensation for its time expended in seeking judicial review because the Commission did not respond within 60 days to Sierra Club's application for rehearing of D.01-11-048 and its subsequent petition for modification of D.01-11-048. Sierra Club argues that although its petitions for review to the Court were denied, they assisted this Commission in ultimately deciding the issues presented. According to Sierra Club, its second petition for review, for example, prompted the Commission to issue D.03-10-063, its Order Staying Decision 01-11-048, in Part, and Denying Rehearing of Decision 03-06-003. Sierra Club believes that because D.03-10-063 mooted many of the issues raised in its second petition for review, the Court denied the latter petition.

As the basis for its request for compensation, Sierra Club relies on the decision of the California Court of Appeal for the Second District in *Southern California Edison Co. v. Public Utilities Commission (The Utility Reform Network, real party in interest)*, 117 Cal. App. 4<sup>th</sup> 1039 (2004 Daily Journal Daily Appellate Report 4827, April 24, 2004). Sierra Club asserts that the court's holding in

*Southern California Edison* was that an intervenor organization representing utility customers, TURN, was entitled to recover compensation for its filings in a related federal district court proceeding “regardless whether such work made a ‘substantial contribution’ to the PUC decisions for which compensation was sought.” (Sierra Club Submission, at 1, citing *Southern California Edison*, at 4831.) Sierra Club quotes the court’s further statement that “once a customer makes [a substantial] contribution to a PUC proceeding, that customer may obtain compensation for the fees and costs of obtaining judicial review, regardless whether that judicial review work made a substantial contribution to the PUC proceeding.” (*Id.*)

Sierra Club misconstrues the Court’s holding in *Southern California Edison*. While Sierra Club accurately quotes portions of the Court’s decision, the discussion to which Sierra club refers is not the Court’s holding, and certainly does not mean that an intervenor in TURN’s or Sierra Club’s position, having made a substantial contribution to a related Commission decision, will always be entitled to compensation for its costs of obtaining judicial review. In fact, as an **unsuccessful challenger** on judicial review of the Commission’s decision in the present case, Sierra Club’s position is not at all analogous to that of TURN, which **successfully defended** the Commission’s underlying decision in federal court proceedings. Thus, TURN did, in fact, make a substantial contribution to the Commission’s decision.

In the *Southern California Edison* case, TURN had intervened in a federal court proceeding to defend the Commission’s jurisdiction, which was being challenged. The federal court upheld the Commission’s jurisdiction, thus preserving the Commission’s ability to decide certain ratemaking matters, and TURN made substantial contributions to the Commission’s decision on those

matters. When TURN sought intervenor compensation, it requested its costs of litigation both before the Commission and in federal court. The Commission concluded that TURN's federal court work was compensable as work associated with obtaining judicial review pursuant to Section 1802(a). The Commission stated that if an intervenor cannot gain compensation to **defend** a Commission decision in which the intervenor prevailed, the intervenor's effectiveness will be severely limited. The Commission interpreted the "judicial review" language of Section 1802(a) as providing for compensation not just when an intervenor initiates and successfully pursues judicial review to challenge a Commission decision, "but also when the intervenor successfully defends a Commission decision against a challenge." (*Southern California Edison, supra*, at 4829.) The utility then challenged the Commission's award insofar as it compensated TURN for TURN's costs in federal court.

Applying the traditional standard of review, that the Commission's interpretation of the Public Utilities Code "should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language," the Court of Appeal concluded that it could not say that the Commission's construction of Section 1802(a) bore no "reasonable relation to statutory purposes and language," because TURN did in fact obtain judicial review and the Commission's construction of the statutory language was consistent with the statutory purposes. (*Southern California Edison, supra*, at 4830.)

In addition, the Court of Appeal rejected claims by the utility that TURN's federal court work was not compensable because it was performed after the Commission issued its decisions to which TURN claimed to have contributed, so the federal court work could not have made a "substantial contribution" to those decisions. Noting that judicial review virtually always occurs after the

Commission has issued its decision, the Court observed that once a customer has made a substantial contribution to a Commission proceeding, the customer may be compensated for costs of judicial review, regardless of whether the judicial review work “made a substantial contribution to the PUC proceeding.”

To summarize, in *Southern California Edison*, the Court upheld the Commission’s decision to compensate TURN for its work in aiding the successful defense on judicial review of a Commission decision to which TURN had contributed. However, *Southern California Edison* is no precedent for compensating Sierra Club for its unsuccessful effort to obtain judicial review to overturn a Commission decision.

In evaluating whether a customer made a substantial contribution to a decision, we look at several things. First, did the Administrative Law Judge (ALJ) or Commission adopt one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the customer? (See § 1802(i).) Second, did the customer’s participation materially supplement, complement, or contribute to the presentation of another party or to the development of a fuller record that assisted the Commission in making its decision? (See §§ 1802(i) and 1802.5.) As described in § 1802(i), the assessment of whether the customer made a substantial contribution requires the exercise of judgment.

In assessing whether the customer meets this standard, the Commission typically reviews the record, composed in part of pleadings of the customer and, in litigated matters, the hearing transcripts, and compares it to the findings, conclusions, and orders in the decision to which the customer asserts it

contributed. It is then a matter of judgment as to whether the customer's presentation substantially assisted the Commission.<sup>1</sup>

Sierra Club has already received compensation for over 80% of its counsel's time and expenses up to and including the submission of post-hearing briefs in August 2001 (see, D.03-01-058, at 6-8). Sierra Club now seeks additional compensation for virtually all its attorneys' time and expenses from September 2002 through the present – including the participation of its attorneys not only in this proceeding but also in their unsuccessful efforts to obtain review of this Commission's decisions, on two separate occasions, by the Court.

While Sierra Club provides a narrative description of its efforts, it mostly fails to identify in what respects these activities contributed substantially to any Commission decision. These activities, described at pages 3-8 of Sierra Club's request, are summarized below, together with the Commission's response:

- Sierra Club filed an application for rehearing of D.01-11-048 request for stay, and request for oral argument in December 2001. The Commission **denied** all those requests in its D.02-04-002, issued April 4, 2002.
- Sierra Club protested Valencia's Advice Letter (AL) 94 in January 2002, but the Commission allowed that advice letter as well as AL 95, both of which implemented D.01-11-048, to become effective.<sup>2</sup>

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<sup>1</sup> D.98-04-059, 79 CPUC2d, 628 at 653.

<sup>2</sup> It was AL 95, which Sierra Club did **not** protest, that extended Valencia's service area to include the planned West Creek real estate development – for which deficiencies in the Environmental Impact Review were the cause of the Commission's eventual adoption of a partial stay of D.01-11-048. (See, D.03-10-063, mimeo. at 4-5.) The Commission's decisions refer to ALs 88 and 90, which were the ALs by which Valencia

*Footnote continued on next page*



- Sierra Club filed its first petition for writ of review with the California Supreme Court in April 2002. The Court **denied** review by its order of June 19, 2002.
- Sierra Club filed its first request for compensation in July 2002, a request the Commission largely granted by D.03-01-058, adopted January 30, 2003.
- Sierra Club made an ex parte submission of information about perchlorate contamination and later submitted comments in connection with its petition to modify D.01-11-048 in February 2003. The Commission **denied** that petition by D.03-06-033, adopted June 5, 2003.
- Sierra Club made another ex parte submission of information about perchlorate contamination at the end of June 2003 and shortly thereafter filed an application for rehearing of D.03-06-033. The Commission, while staying D.01-11-048, in part, **denied** rehearing of its June decision by D.03-10-063, adopted October 16, 2003.
- Sierra Club filed its second petition for writ of review with the California Supreme Court in October 2003. The Court **denied** review by its order of December 23, 2003.

In sum, the results of two and one-half years of Sierra Club's efforts, from September 2001 through December 2003, are:

- Denial by the Commission of two applications for rehearing, one petition for modification, one advice letter protest, and assorted procedural motions;

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originally proposed the relevant service area expansions. Water Division rejected those ALs pending the Commission's decision in this proceeding. In compliance with D.01-11-048 and at the direction of Water Division, Valencia refiled what had been ALs 88 and 90 as ALS 94 and 95, respectively.

- Denial by the California Supreme Court of two petitions for write of review;
- Award of intervenor compensation for contributions to a prior Commission decision; and
- Partial stay of the same decision to which the prior award of compensation pertained.

We conclude that there is no basis for the Commission to recognize an intervenor as having made a “substantial contribution” to a decision that denies all relief requested by that party or to award any amount of compensation on that basis. Therefore, the only results with respect to which Sierra Club can claim to have made a substantial contribution to a Commission decision are: (1) the previous award of compensation by D.03-10-058, and (2) the partial stay of D.01-11-048 by D.03-10-063, following the judicial de-certification of the West Creek EIR on which Valencia’s applications to expand its service area were based in part. Sierra Club is entitled to compensation for no more than its attorneys’ work and costs that contributed to those actions by the Commission. The details of Sierra Club’s claims, as set forth at pages 8 through 12 of its request, and our determinations with regard to substantial contribution are discussed below.

**A. First Application for Rehearing Filed  
December 31, 2001 (Request p. 8)**

For its services during September through December 2001, Sierra Club requests compensation for 46.6 hours of attorney’s time and related expenses for (1) its November 19, 2001 comments on the ALJ’s draft decision that resulted in D.01-11-048; and (2) its December 31, 1001 Application for Rehearing, Request for Stay, and Request for Oral Argument.

We deny Sierra Club's request for compensation for its attorney's time for preparing comments on the ALJ's draft decision because Sierra offers no explanation why these costs were not included in its first compensation request filed on July 24, 2002, addressed in D.03-01-058 issued January 31, 2003. We will not allow Sierra Club to supplement its first compensation request at this late date. (See Section 1804(c) regarding timeliness of compensation requests.)

We also deny Sierra Club's request related to its December 31, 2001 application for rehearing of D.01-11-048. The Commission denied rehearing, stay and oral argument in D.02-04-002. Therefore, there was no substantial contribution to a Commission decision.

**B. First Petition for Review by Supreme Court  
(Request p. 9.)**

For its services during January through April 2002, Sierra Club requests compensation for 18.2 hours of attorney's time and related expenses for its first petition for review filed on April 2, 2002 in the California Supreme Court. Sierra Club states that in light of the lack of a response from the Commission within the 60-day period provided under Pub. Util. Code § 1733(b) to its December 31, 2001 application for rehearing of D.01-11-048, it was reasonable for Sierra Club to seek appellate review on the matters raised in its application for rehearing. The Commission, subsequently, in D.02-04-002 issued April 14, 2002, denied Sierra Club's application for rehearing. Also, the Court declined review of Sierra Club's petition.

We deny Sierra Club's request because of lack of substantial contribution. Sierra Club is not entitled to compensation for its application for rehearing, which was denied by the Commission in D.02-04-002, or for its failed petition for review by the Court. We also reject Sierra Club's contention that its

petition to the Court somehow assisted the Commission to issue its decision, or contributed to the Commission's decision.

**C. Preparation of First Request for Compensation (Request p. 10)**

For services during July through September 2002, Sierra Club requests compensation for (1) 7.3 hours attorney's time preparing its first request for compensation filed July 24, 2002; and (2) 22.8 hours attorney's time plus related expenses in reviewing and responding to Valencia's opposition to Sierra Club's compensation request.

We grant Sierra Club's request for compensation in part because these services relate to the substantial contribution to D.01-11-048 as recognized by the Commission in D.03-01-058. The 7.3 hours of attorney time for preparation of the compensation request is denied because it should have been included in Sierra Club's July 24, 2002 request for compensation. We will allow compensation for Sierra Club's time (22.8 hours) spent preparing its response to Valencia's opposition (and the related expenses); however, those hours will be reduced by 50% as required by the Commission with respect to preparation and justification of award requests. In sum, we allow compensation for 22.8 hours at half of the attorney's regular hourly rate (D.03-01-058 adopted \$250/hour), plus reasonable out-of-pocket expenses of \$105.93.

**D. Comments on ALJ's Proposed Decision  
Denying Petition for Modification of  
D.01-11-048 (Request p. 10)**

Sierra Club requests compensation for 12.2 hours of attorney's time and related expenses for its comments on the ALJ's draft decision on its petition for modification of D.01-11-048.

We deny Sierra Club's request for compensation because there was no substantial contribution to the Commission's decision since Sierra Club's comments were not adopted in D.03-06-033, and its petition for modification was denied.

**E. Application for Rehearing of D.03-06-033  
(Request p. 11)**

Sierra Club requests compensation for 5.2 hours of attorney's time and related expenses in preparing its petition for rehearing of D.03-06-033.

We find substantial contribution to the extent that on October 16, 2003, the Commission issued D.03-10-063, its Order Staying Decision 01-11-048 in Part and Denying Rehearing of D.03-06-033. Accordingly, we allow compensation for attorney's time of 5.2 hours plus reasonable expenses of \$80.75.

**F. Second Petition for Review Filed in the  
California Supreme Court on October 6,  
2003 (Request p. 11)**

Sierra Club seeks compensation for 24.2 hours of attorney's time and related expenses preparing its second petition for review to the Court. Sierra Club states that the petition was necessary because the Commission did not respond to its July 7, 2003 petition for rehearing of D.03-06-033 within the 60-day period provided under Pub. Util. Code § 1733(b). According to Sierra Club, following its petition to the Court and in apparent response thereto, on October 16, 2003, the Commission issued D.03-10-063, its Order Staying Decision 01-11-048 in Part and Denying Rehearing of Decision 03-10-033. Later, the Court declined review of Sierra Club's petition.

We deny Sierra Club's request for compensation because there was no substantial contribution to a Commission decision. The Commission took more than 60 days to issue its order denying rehearing, but Section 1733(b) merely

permits the rehearing applicant to deem it denied in that circumstance. Sierra Club could have awaited our order but chose not to. Sierra Club's argument that its petition to the Court caused the Commission to issue its decision is (1) completely without basis, and (2) would not constitute a "substantial contribution" even if true. We will not compensate Sierra Club for a failed petition to the Court.

## **VI. Reasonableness of Requested Compensation**

Sierra Club provided a description of its services and expenditures.

Sierra Club's corrected request is summarized below:

### **Attorney's fees**

Stephan C. Volker

and

Eileen Rice

121.45 hours x \$250/hour

= \$30,362.50

### **Other Costs**

Copying, postage, etc.

1,492.04

\$31,854.54

### **A. Hours Claimed**

We found earlier that 22.8 hours of attorney's time for Sierra Club's first request for compensation, and 5.2 hours of attorney's time for its second application for rehearing, are reasonable.

### **B. Hourly Rates**

Sierra Club seeks compensation for both of its counsel at the hourly rate of \$250 per hour, in accordance with its Notice of Intent to Claim Compensation, which projected an hourly rate for counsel of \$250. As previously found reasonable in D.03-01-058 for attorney Stephan C. Volker, we approve the hourly rate of \$250 for his services.

Eileen M. Rice, an associate attorney, performed 10.5 of the hours spent responding to Valencia's opposition of the first compensation request. The remaining hours (12.3) for preparation of the compensation request were spent by Volker. Rice completed law school in 1999 and has several years of litigation experience. We approve an hourly rate of \$200 for Rice for 2002 consistent with the rates we have adopted for other 1999 law school graduates (see D.03-04-011),

but because all of her work was on compensation-related matters, we award compensation at half her hourly rate.

### **C. Other Costs**

We have reviewed Sierra Club's summary of out-of-pocket expenses for postage and copying, and find the amounts related to the filings for which we award compensation reasonable given the scope of this proceeding. The total reasonable out-of-pocket expenses are \$186.68.

### **D. Award**

As set forth in the table below, we award \$4,074.18.

| <u>Attorney</u>          | <u>Year</u>  | <u>Rate</u> | <u>Hours</u> | <u>Total</u> |
|--------------------------|--------------|-------------|--------------|--------------|
| Volker                   | 2002<br>2203 | \$250       | 5.2          | \$1,300.00   |
| Volker<br>(compensation) | 2002         | \$125       | 12.3         | \$1,537.50   |
| Rice                     | 2002         | \$100       | 10.5         | \$1,050.00   |
| Total Advocates          |              |             |              | \$3,887.50   |
| Other Costs              |              |             |              | \$ 186.68    |
| Total Award              |              |             |              | \$4,074.18   |

Consistent with previous Commission decisions, we will order Valencia to pay the award to Sierra Club plus any interest due (calculated at the three-month commercial paper rate), commencing May 8, 2004 (the 75<sup>th</sup> day after Sierra Club filed its compensation request) and continuing on the unpaid amount until full payment of the award.

As in all intervenor compensation decisions, we put Sierra Club on notice that the Commission staff may audit Sierra Club's records related to this



award. Thus, Sierra Club must retain adequate accounting and other documentation to support its claim for intervenor compensation.

## **VII. Comments on Draft Decision**

Pursuant to Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment may be waived because this is an intervenor compensation decision. However, in this case, we have allowed comments under the normal 30-day comment period. No comments were received.

## **VIII. Assignment of Proceeding**

Geoffrey F. Brown is the Assigned Commissioner and Bertram D. Patrick is the assigned Administrative Law Judge in this proceeding.

## **Findings of Fact**

1. Sierra Club has made a timely request for compensation.
2. Sierra Club has made a showing of significant financial hardship by demonstrating the economic interests of its individual members would be small compared to the costs of participating in this proceeding.
3. Sierra Club made a substantial contribution but only to the extent of the time it spent (1) responding to opposition to its first request for compensation, and (2) preparing its second application for rehearing.

## **Conclusions of Law**

1. To the extent recognized in the foregoing opinion and findings of fact, Sierra Club has fulfilled the requirements of §§ 1801-1812, which govern awards of intervenor compensation.
2. Sierra Club should be awarded \$4,074.18 for its contribution to D.01-11-048 and D.03-10-063.

3. Sierra Club's request for compensation, except as provided above, should be denied.

4. This order should be effective today so that Sierra Club may be compensated without unnecessary delay.

**O R D E R**

**IT IS ORDERED** that:

1. The Angeles Chapter of the Sierra Club (Sierra Club) is awarded \$4,074.18 in compensation for its substantial contribution to Decision 01-11-048.

2. Valencia Water Company (Valencia) shall pay Sierra Club \$4,074.18 within 30 days of the effective date of this order. Valencia shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15, with interest, beginning May 8, 2004, and continuing until full payment is made.

3. This proceeding is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

## Compensation Decision Summary Information

|                                  |                        |
|----------------------------------|------------------------|
| <b>Compensation Decision:</b>    |                        |
| <b>Contribution Decision(s):</b> | D0111048               |
| <b>Proceeding(s):</b>            | A9912025               |
| <b>Author:</b>                   | ALJ Patrick            |
| <b>Payer(s):</b>                 | Valencia Water Company |

## Intervenor Information

| <b>Intervenor</b> | <b>Claim Date</b> | <b>Amount Requested</b> | <b>Amount Awarded</b> | <b>Multiplier?</b> | <b>Reason Change/Disallowance</b>  |
|-------------------|-------------------|-------------------------|-----------------------|--------------------|--|
| Sierra Club       | 2/23/04           | \$31,854.54             | \$4,074.18            | No                 | Failure to make substantial contribution; failure to justify hourly rate |

## Advocate Information

| <b>First Name</b> | <b>Last Name</b> | <b>Type</b> | <b>Intervenor</b> | <b>Hourly Fee Requested</b> | <b>Year Hourly Fee Requested</b> | <b>Hourly Fee Adopted</b> |
|-------------------|------------------|-------------|-------------------|-----------------------------|----------------------------------|---------------------------|
| Stephen           | Volker           | Attorney    | Sierra Club       | \$250                       | 2000-2003                        | \$250                     |
| Eileen M.         | Rice             | Attorney    | Sierra Club       | \$250                       | 2002                             | \$200                     |